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No. 88-38

In The
Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
RICHARD N. MORASH,
Respondent.

On Writ of Certiorari
to the Supreme Judicial Court
for the Commonwealth of Massachusetts

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether an employer's agreement, which allowed employees to accrue unused vacation time and receive payment for such vacation time upon termination, constituted an "employee welfare benefit plan" under Section 3(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002.

2. Whether the Massachusetts Non-Payment of Wages Statute relates to an "employee welfare benefit plan" under Section 3(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

3. Whether prosecution under a Massachusetts criminal statute that penalizes employers for refusal to pay vacation benefits under an "employee welfare benefit plan" is preempted by the broad preemption provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), or rather is saved from preemption by Section 514(b)(4) of that Act, 29 U.S.C. § 1144(b)(4), that excepts generally applicable criminal laws of a state from preemption.

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INTRODUCTION

At issue in this case is a decision of the Massachusetts Supreme Judicial Court, *Commonwealth v. Morash*, 402 Mass. 485, 419 N.E.2d 409 (1988), holding that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., preempts a Massachusetts statute, Mass. Gen. L., ch. 149, § 148, as it relates to vacation benefit plans under oral or written agreements. This brief is submitted in support of the Massachusetts court's holding.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Employee Retirement Income Security Act:

Section 3. *For purposes of this title:*

> (1) *The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program* which was . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, . . . (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits,* apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002 (emphasis added).

Section 514. *Effect on Other Laws:*

> (a) [T]he provisions of this title . . . *shall supercede any and all state laws* insofar as they may now or hereafter *relate to any employee benefit plan* . . . .

(b)(4) Subsection (a) of this section shall not apply to any *generally applicable criminal law* of a State.

29 U.S.C. § 1144 (emphasis ~~added~~).

Labor-Management Relations Act:

Section 302(c). *Restrictions on Financial Transactions:*

(c) Exceptions

The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, . . . (6) with respect to money or other thing of value paid by any employer to a *trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits*, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships . . . or (B) child care centers . . . (8)

with respect to money or any other thing of value paid by any employer to a trust fund . . . for the purpose of defraying the costs of legal services for employees, their families, and dependents . . .

29 U.S.C. § 186 (emphasis added).

Department of Labor "Payroll Practices" Regulation:

(b) *Payroll practices.*

[T]he terms *"employee welfare benefit plan"* and "welfare plan" *shall not include*—

. . .

(3) Payment of compensation, out of the employer's general assets, *on account of periods of time during which the employee*, although physically and mentally able to perform his or her duties and not absent for medical reasons . . . *performs no duties;* for example—

(i) Payment of compensation *while an employee is on vacation* or absent on a holiday . . .

29 C.F.R. § 2510.3-1(b) (1987) (emphasis added).

Massachusetts Nonpayment of Wages Statute:

The word "wages" shall include any holiday or *vacation payments* due an employee *under an oral or written agreement.*

Mass. Gen. L., ch. 149, § 148 (1982) (emphasis added).

STATEMENT OF THE CASE

In May, 1984, The Yankee Companies, Inc. acquired the stock of Home Savings Bank, which was experiencing serious financial difficulties. The Yankee Companies installed Respondent, Richard N. Morash, as President and

changed the bank's name to Yankee Bank for Finance and Savings (hereinafter the "Bank"). (J.A. 17)[1]

Approximately one year later, the Bank terminated the employment of two former Home Savings Bank vice-presidents who had remained vice-presidents of the Bank after the acquisition. Upon their termination, the vice-presidents claimed that the Bank had a policy or practice of allowing employees to accumulate unlimited numbers of unused vacation days, and to receive a lump-sum payment for such banked vacation time upon separation. Under such practice, employees could earn vacation time in 1984, for example, and then receive payment for their unused 1984 time upon termination of employment in 1988 at their 1988 salary or wage rate. Thus, if an employee's wage rate rose from ten dollars an hour in 1984 to twenty dollars an hour in 1988, the value of the unused days would increase by one hundred percent. In addition, employees would be taxed on the value of the vacation time in the year of termination, when they received payment, rather than in the year in which the vacation time was earned.

The vice-presidents claimed they had saved 66 and 42 unused vacation days, respectively, and demanded payments of approximately $14,500 and $11,000. (J.A. 18) When the Bank took issue with the amounts of such claims and refused to make the payments, the vice-presidents filed claims with the Massachusetts Department of Labor and Industries under the Massachusetts Nonpayment of Wages Statute, Mass. Gen. L., ch.149, § 148 (1982) (hereinafter

1. Respondent indicates references to the Joint Appendix as (J.A. —).

the "Massachusetts Statute").[2] (J.A. 18-19) The vacation pay claims fell under the Massachusetts Statute because it provides that the word "wages" includes "vacation payments due an employee *under an oral or written agreement.*" (emphasis added) (J.A. 19) As a result of the vice-presidents' claims that such an agreement existed, the Commonwealth of Massachusetts initiated criminal proceedings against Morash. (J.A. 18)[3]

Morash moved to dismiss the criminal complaints on the ground that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (hereinafter "ERISA"), preempts application of the Massachusetts Statute to employers' agreements to pay employees for accrued, unused vacation time upon separation from employment. (J.A. 7-13) Because of the import of the issue presented by the motion, the trial court reported the question of law to the Massachusetts Court of Appeals.[4] (J.A. 14-15) To report the question of law, the parties stipulated that:

2. Although the Bank refused to make payments for unused vacation time earned prior to the year of termination, the Bank agreed that it had a policy of paying employees for vacation time earned but not used within the year of termination, and it tendered such payments. (J.A. 19)

3. Each vice-president also filed a civil action, which includes an ERISA count for the same vacation benefits at issue in the instant case.

4. The Massachusetts Supreme Judicial Court accepted the case *sua sponte* for its direct review.

the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time.

(J.A. 19)[5]

The question reported was whether ERISA precludes prosecution of an employer for not "compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement." (J.A. 14-15) The Massachusetts Supreme Judicial Court answered the question affirmatively, holding that the agreement to make such vacation payments was an "employee welfare benefit plan" under ERISA. Therefore, prosecution under the Massachusetts Statute was preempted. (Pet. A6-7)[6]

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SUMMARY OF ARGUMENT

In enacting ERISA, Congress purposefully provided for comprehensive and preemptive federal regulation of the field of employee benefit plans. To ensure broad coverage of employee benefit plans, Congress enumerated many benefits to which ERISA applies. Expressly included in that list is "vacation benefits."

Cognizant of Congress' language and intentions, the Massachusetts Supreme Judicial Court has held that

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5. The parties did not stipulate, and therefore there is no record, regarding the Bank's means of recordkeeping or how it administered the program, except that the Bank made the payments from its general assets.

6. Respondent cites to the Massachusetts Supreme Judicial Court's *Morash* decision by referring to the copy of the opinion provided in Appendix A of Petitioner's Petition for Writ of Certiorari, indicated as (Pet. A —).

ERISA preempts application of the Massachusetts Statute to the particular vacation benefit plan at issue in *Morash*, which allowed employees to accumulate unused vacation time and receive a lump-sum payment for such time upon termination. The Supreme Judicial Court's holding is based on three rulings of law: (1) that the Bank's vacation benefit plan was an "employee welfare benefit plan" as defined by ERISA; (2) that the Massachusetts Statute relates to an "employee welfare benefit plan" by referring to agreements to provide vacation pay and by applying to the Bank's vacation plan; and (3) that the limited exception to ERISA's preemption for "generally applicable criminal laws" does not apply to the Massachusetts Statute to save it from preemption.

The main thrust of Petitioner's disagreement with the Massachusetts court's decision is a regulation issued by the Department of Labor in 1975 (hereinafter the "Regulation"). The Regulation purports to distinguish certain wage-related vacation payments made regularly during the course of employment from vacation benefit plans to which ERISA applies. Petitioner and its amici argue that under the Regulation the Bank's vacation benefit plan is a wage or payroll practice outside of ERISA's coverage.

Respondent disagrees. Respondent contends that the Regulation does not apply to the Bank's vacation benefit plan, because the Regulation applies solely to the regular wages which employees receive while employed but on vacation. The Bank's program was not such a program. Instead, it was an agreement to provide a lump-sum payment upon termination of employment for accrued, unused vacation time. Additionally, the Bank's plan allowed

an employee to accumulate compensation on a tax-deferred basis.

If, however, the Regulation applies to the Bank's vacation benefit plan, Respondent submits that the Regulation clearly contravenes ERISA's express coverage of vacation benefit plans. There is no indication, either express or implied, that Congress intended the term "vacation benefits" in ERISA to apply only to funded vacation plans, as Petitioner and the amici argue. A Regulation which interprets ERISA to exclude certain specifically enumerated benefits construes the statute in an impermissible manner.

Since the Bank's vacation program is an "employee welfare benefit plan," there are two additional issues for the Court's consideration. First, Petitioner contends that even if an agreement to provide vacation benefits is an "employee welfare benefit plan," the Massachusetts Statute does not "relate to" such a plan. Since, however, the language of the Massachusetts Statute refers to "vacation payments due an employee under an oral or written agreement," and the Commonwealth of Massachusetts utilizes that statute to compel employers to comply with ERISA-covered vacation benefit plans, the law clearly relates to "employee welfare benefit plans." Second, Petitioner tries to save the Massachusetts law from preemption through ERISA's exemption for "generally applicable criminal laws." Respondent submits that the Massachusetts law, while criminal, is not "generally applicable" as are laws against larceny or embezzlement, but applies only to a limited group of employers which agree to provide certain vacation benefits.

ARGUMENT

I. THE BANK'S VACATION BENEFIT PLAN IS AN "EMPLOYEE WELFARE BENEFIT PLAN" UNDER ERISA.

A. The Department Of Labor Regulation Defining "Payroll Practices" Does Not Exclude The Bank's Vacation Benefit Plan From ERISA's Coverage.

Section 3 of ERISA provides that "the terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund or program . . . established or maintained by an employer . . . for the purpose of providing for its participants . . . *vacation benefits* . . . ." § 3; 29 U.S.C. § 1002 (emphasis added). Under such unambiguous language, vacation benefit plans, funds or programs are "employee welfare benefit plans" within ERISA's coverage. Thus, if ERISA is taken literally, the Bank's vacation benefit plan is an "employee welfare benefit plan."

Petitioner and its amici apparently agree that the language quoted above brings certain vacation benefit arrangements squarely within ERISA's coverage, but argue that the Bank's vacation benefit plan or program should be excluded from such coverage. The basis for their argument is a Department of Labor Regulation which provides:

> [T]he terms "employee welfare benefit plan" and "welfare plan" shall not include—
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> . . . .
>
> (3) Payment of compensation, out of the employer's general assets, *on account of periods of time during which the employee . . . performs no duties;* for example—(i) Payment of compensation *while an employee is on vacation* or absent on a holiday . . . .

29 C.F.R. § 2510.3-1 (emphasis added) (hereinafter the "Regulation").

Although the Regulation lacks clarity, it was apparently promulgated to distinguish benefits from simple wages, and to exclude such wages from ERISA's coverage. Indeed, Petitioner and the amici contend that the benefits provided by the Bank's plan cannot be distinguished from simple wages and thus come within the Regulation.

The Massachusetts Supreme Judicial Court disagreed with Petitioner's arguments by holding that the Bank's plan did not fall within the Regulation.[7] According to such court, the portion of the Regulation applicable to vacation pay deals with an employer's payments to employees while they are on vacation and performing no duties, but not with payment for unused vacation time upon termination. The court further stated that the Bank's vacation benefit plan was more akin to a severance pay plan, which is an employee benefit plan that clearly falls within the coverage of ERISA, than to the types of wage practices addressed by the Regulation. (Pet. A13)

In disagreeing with the Massachusetts Supreme Judicial Court's decision, Petitioner and its amici contend that the Bank's program was not akin to a severance pay plan, but was simply a wage plan. To support such position, Petitioner focuses on a fact pattern different than

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7. The Massachusetts Supreme Judicial Court stated that it need not decide whether the Regulation was valid, because such Regulation did not apply to the Bank's plan. (Pet. A13)

the one presented by *Morash*. (Pet. br. 37-38)[8] Petitioner notes that when an employee takes two weeks as vacation time and receives payment for that time, the employee simply receives wages for a period of time not worked. In such a case, the employee on vacation receives his/her normal paycheck from which the employer deducts normal taxes, social security payments, and any other deductions the employee authorizes, such as payment for health insurance. Both during and after vacation, the employee receives the same wage check received prior to vacation.

Although such a practice might be precisely the situation the Department of Labor attempted to remove from ERISA coverage, it is not the factual situation presented by this case. Under the Bank's vacation benefit plan, employees were allowed, at their option, to save and accumulate vacation time, and to defer payment for such time until termination.[9] Upon termination of employment, the employee would receive a check for accumulated time, with such time valued at the employee's current wage or salary, rather than at the wage or salary the employee was earning in the year when the vacation time was earned.

The tax ramifications of the Bank's plan were also significantly different than those of "normal" vacation payments. If an employee did not take vacation time dur-

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8. Respondent indicates references to the various opposing briefs as follows: Petitioner's brief as (Pet. br. —), the Solicitor General's brief as (SG —), the AFL-CIO's brief as (AFL —), and the State Attorneys General's brief as (States —).

9. The AFL-CIO and Solicitor General have suggested that the Bank's plan provided a premium to employees who were required to forfeit vacation time in any given year. (AFL 10-11; SG 20-21) The record does not support such suggestion.

ing the year in which it was earned, the employee was not required to pay taxes on such vacation earnings for that year. Tax payments were not required until termination, when the employee received a lump-sum monetary distribution. Thus, not only was the Bank's vacation benefit plan akin to a severance plan, but it had some of the tax attributes of a deferred compensation or savings program. Under those programs, employees may, at their option, set aside certain earned income by placing it in a tax deferred account, and the deferred amount earns interest or otherwise increases as time passes. Taxes do not become due until the money is withdrawn. Under the Bank's benefit plan, the employees had the option of setting aside a certain portion of their "earnings" in the form of accrued but unused vacation time. The tax on such earnings was deferred until the earnings were withdrawn. In the interim, the time between earning and withdrawal, the saved amount would increase in value as the employee's wage or salary increased.

Unable to counter the factual distinctions between the Bank's vacation benefit plan and normal payments for vacation time taken during employment, Petitioner and its amici have focused on one factor in support of their argument, namely that the Bank made its lump-sum payment upon termination from its "general assets."[10] The term "general assets" is contained in the Regulation, which refers to "payment of compensation, *out of the employer's*

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10. The Solicitor General's entire argument in support of Petitioner's position is grounded in the general assets test. According to the Solicitor General, for a vacation benefit plan to come within ERISA coverage, it must be "funded." (SG 13-14, 17)

general assets, on account of periods of time during which the employee . . . performs no duties." 29 C.F.R. § 2510.3-1 (emphasis added). Petitioner and its amici contend that any vacation plan with payment made out of general assets is not an "employee welfare benefit plan" under ERISA. In fact, Petitioner and its amici take their argument one step further, and suggest that in order for a vacation benefit plan to fall within ERISA's coverage, the plan must be funded. (Pet. br. 38, SG 14, AFL 18)

The "general assets" test is incorrect for a number of reasons. First, the argument that ERISA does not cover vacation benefits paid out of general assets patently ignores the language of the statute. Congress clearly stated that under ERISA an "employee welfare benefit plan" includes "any *plan*, fund or *program* . . . [to] . . . provid[e] . . . vacation benefits." § 3; 29 U.S.C. § 1002 (emphasis added). If payment out of general assets were the key factor in determining whether such a plan is an employee welfare benefit plan, "plans" and "programs," which are generally not funded, would be eliminated from ERISA coverage, and only "funds" would remain. If Congress had meant ERISA to apply only to funded employee welfare benefit plans, the words "plan" and "program" would not appear in the statute. Congress, however, chose to include both the terms "plan" and "program." In determining congressional intent a court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985), quoting from *Park 'N Fly, Inc. v. Dallas Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

Second, Petitioner's argument fails to consider other definitional language of ERISA, specifically § 3(1)(B). Under § 3(1)(B), ERISA defines "employee welfare benefit plans" to include those funds identified in or described by § 302(c) of the Labor Management Relations Act. Section 302(c) specifically refers to jointly administered, management/union, "pooled vacation funds." Both the Solicitor General and the AFL-CIO state in their amici briefs that pooled vacation plans, such as those negotiated by the longshoremen and construction unions, are the only types of vacation benefit programs meant to fall within ERISA's coverage. (SG 14, AFL 18) If the Solicitor General and AFL-CIO were correct, Congress would have had no reason to include the term "vacation benefits" in § 3(1)(A) of ERISA, since the funds to which the amici refer are both included within § 3(1)(B). Such a result is both unreasonable and incorrect because, again, if Congress had meant ERISA to apply only to those vacation benefits paid from pooled vacation funds, it easily could have said so. This Court cannot ignore statutory language, as the Solicitor General and AFL-CIO would advocate.

Third, a test based on "general assets" ignores the reality that most employer-provided welfare benefit plans are paid out of general assets. By far the minority of employee welfare benefit plans sponsored and provided by employers in this country today utilize funds.[11] If the

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11. Employee welfare benefit plans must be distinguished from pension plans. One hundred percent (100%) of pension plans are funded. Employee welfare benefit plans, which provide for programs such as insurance coverage, severance pay, deferred compensation programs and vacation benefit programs, are generally not funded.

general assets factor were considered determinative, then few, if any, employee welfare benefit plans would come within ERISA's coverage, a conclusion already in contravention of this Court's decisions. This Court has recognized, for example, that severance pay plans, although paid out of general assets, qualify as "employee welfare benefit plans" rather than as wage payments. *Fort Halifax Packing Co. v. Coyne,* 107 S.Ct. 2211, 2215, n. 5 (1987), citing *Holland v. Burlington Indus., Inc.,* 772 F.2d 1140 (4th Cir. 1985) and *Gilbert v. Burlington Indus., Inc.,* 765 F.2d 320 (2d Cir. 1985), both *aff'd,* 477 U.S. 901 (1986). Since severance plans with payments made out of general assets are "employee welfare benefit plans," a plan similar to a severance plan, such as the Bank's vacation benefit plan, must also fall within ERISA's coverage.

Finally, the general assets factor is one of many factors set out by the Regulation in question, not the only factor. The Regulation, which must be read as a whole, refers to payments "out of the employer's general assets, on account of periods of time during which the employee . . . performs no duties; for example—(i) Payment of compensation while an employee is on vacation . . . ." Thus, the term "general assets" must be read in conjunction with the phrase "performs no duties." In the instant situation, while the Bank made its lump-sum vacation pay distribution out of general assets, it was not paid to an *employee* who was *performing no duties while on vacation.* Rather, the Bank provided the lump-sum distribution to an individual who had terminated employment and had no duties to perform.

For the above-stated reasons, the Massachusetts Supreme Judicial Court was correct in holding that the

Bank's vacation benefit program was within ERISA's coverage, as opposed to a wage program under the Department of Labor's Regulation. To hold that the Bank's plan was within the Regulation would have the effect of placing virtually every vacation benefit plan paid out of general assets outside of ERISA's coverage, thus ignoring the clear language of that statute.

B. If The Regulation Excludes The Bank's Plan From ERISA's Coverage, The Regulation Is Void.

1. The Regulation conflicts with ERISA's express coverage.

The Supreme Judicial Court found it unnecessary to rule on the validity of the Regulation at issue in this case. (Pet. A13) If, however, this Court finds that the Bank's plan is covered by the Regulation, Respondent submits that the Regulation is invalid.

To assess the validity of a regulation, this Court must determine whether the promulgating agency's construction of a statute is contrary to congressional intent, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If congressional intent is clear, and the regulation departs from such intent, then "that is the end of the matter." *Id.* In this case, the Solicitor General and the AFL-CIO argue that the Department of Labor has construed ERISA's express inclusion of vacation benefit plans, funds or programs to mean only vacation plans that provide for payment from funds. According to the Solicitor General, "payment of vacation benefits from a trust fund . . . is subject to ERISA. But otherwise the payment of vacation benefits is governed by state law."

(SG 14) Similarly, the AFL-CIO contends that the Secretary of Labor has delineated the types of vacation benefit plans that are covered by ERISA, but then offers only one example of such plan, a multi-employer trust fund. (AFL 16-17) It is clear, however, that Congress did not intend to limit ERISA's vacation benefit coverage only to funded plans.

First, Congress expressly identified two methods of establishing and maintaining a vacation "employee welfare benefit plan" under ERISA that do not require a fund—plans or programs. § 3(1); 29 U.S.C. § 1002(1). If the Regulation limits the vacation benefits that ERISA covers to only those vacation payments maintained or provided by funds, then the Regulation eliminates from ERISA's coverage two of the three expressly identified methods of providing benefits.

Second, Congress provided separately for the types of vacation benefits that the Solicitor General and AFL-CIO offer as lone examples of the types of vacation benefit plans within ERISA's coverage. In subsection (1)(A) of Section 3, Congress listed the types of benefits that a plan, fund or program might provide, and included vacation benefits in that list. § 3; 29 U.S.C. § 1002(1)(A). In subsection (1)(B) of Section 3, Congress stated that the term "employee welfare benefit plan" also includes "any benefit described in section 186(c) of this title." § 3; 29 U.S.C. § 1002(1)(B). By incorporating section 186(c), § 302 of the Labor Management Relations Act, into ERISA, Congress specifically ensured that "pooled vacation funds" would be covered by ERISA. Had Congress intended "vacation benefits" in § 3(1)(A) to mean only pooled or funded vacation benefits, there would have been no need to create § 3(1)(B). Since statutory language cannot be considered

superfluous, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), "vacation benefits" in § 3(1)(A) has meaning only if it refers to something other than pooled vacation funds, for example, the Bank's vacation benefit plan.

2. If, arguendo, ERISA is ambiguous regarding vacation benefits, the Regulation's interpretation of ERISA is unreasonable.

Even if, arguendo, it were not clear whether Congress intended the Bank's vacation benefit plan to fall within ERISA's coverage, the Regulation's interpretation is unreasonable and, therefore, invalid. When a statute is silent or ambiguous and a court determines that "Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute," *Chevron, U.S.A., Inc.*, 467 U.S. at 843. In this case, the Department of Labor has derived its answer from an unreasonable and impermissible interpretation of ERISA.

The Department of Labor's interpretation is impermissible for several reasons. Again, insofar as the Regulation eliminates "plans" and/or "programs" from ERISA coverage, the Regulation belies the plain language of that statute. Furthermore, it is unreasonable to add a funding requirement to vacation benefit plans when Congress did not do so.

The Department of Labor's interpretation of ERISA is also unacceptable because it disregards ERISA's fundamental purposes. One such purpose was to provide an exclusive federal system to regulate the field of employee benefit plans. Both ERISA's language and its history

categorically establish that Congress intended ERISA's scope to ensure protection of virtually *all* employee benefit plans. § 2; 29 U.S.C. § 1001. ERISA plainly states:

> The provisions of this title . . . shall supercede any and all State laws insofar as they may now or hereafter relate to *any* employee benefit plan . . . .

§ 514(a); 29 U.S.C. § 1144(a) (emphasis added).

ERISA's legislative history underscores just how purposefully Congress extended ERISA's parameters. Congress did not include a preemption provision in ERISA cavalierly. In fact, both the House and Senate versions of ERISA provided for broad preemption. H.R. 2, 93d Cong., 2d Sess., § 514 (1974); H.R. 2, 93d Cong., 1st Sess., § 699 (1973). Each of those versions provided that ERISA would preempt any state laws that might regulate the same areas explicitly regulated by ERISA, and one such area is *vacation benefits*. Significantly, the Conference Committee rejected those versions in order to *broaden* preemption to extend to *all* state laws unless expressly saved. *See* H.R. Conf. Rep. No. 93-1280, p. 383 (1974). According to Senator Javits, the rejected provisions

> raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws.
>
> The emergence of a *comprehensive* and *pervasive* Federal interest and the interests of *uniformity* with respect to interstate plans required—but for certain exceptions—the displacement of State action *in the field of private employee benefit programs.*

120 Cong. Rec. 29942 (1974) (emphasis added). Based on ERISA's language and history, this Court has recognized that to effectuate Congress' intentions, the courts must view ERISA's coverage and preemption expansively. *Pilot*

Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549, 1552 (1987). Against that background, the Department of Labor's construction of ERISA that narrows that statute's applicability is not permissible.

The Department of Labor's interpretation also ignores that ERISA covers "employee welfare benefit plans" as well as pension plans. Petitioner and its amici justify limiting coverage of the vacation benefits section to fund-based vacation benefits by focusing on Congress' concern for *pension* plan mismanagement, and by suggesting that ERISA does not cover unfunded welfare plans because mismanagement concerns are not relevant to them. (SG 17) Petitioner contends that Congress was "primarily concerned" with pension plans and abuses. (Pet. br. 41) Yet Congress enacted a statute that covers "employee welfare benefit plans" as well as pension plans, and in its coverage of "employee welfare benefit plans," Congress did not limit ERISA's application to plans that were funded.

Finally, the Department of Labor's interpretation is impermissible because it impedes the use of ERISA to protect welfare benefit plans from abuses Congress intended to address.[12] When Petitioner states that it was only vacation funds "that Congress intended to control because these plans were potential targets for abuse and mismanagement," (Pet. br. 42) it mistakenly ignores two

12. Petitioner and its amici states express concern that if the states can no longer regulate these vacation payment plans, employees are left unprotected. (Pet. br. 45, States 9) That contention is absurd. The issue here is not whether employees' vacation benefits will be protected, but simply which law, federal or state, will regulate such benefit plans and protect the employees' benefits.

factors: (1) that promises of future payments of vacation benefits without establishment of a fund are also subject to abuse and mismanagement, particularly if no accounting is made to ensure that an employer maintains sufficient monies to pay the benefits when claimed, and (2) that Congress also intended to correct a second abuse, failure or refusal to pay employees the benefits promised, *California Hosp. Ass'n v. Henning,* 770 F.2d 856, 859 (9th Cir. 1985).

Vacation benefit plans, like the Bank's plan, may raise both issues. If an employer promises its employees that they can bank vacation time and receive payment for it upon termination, but at such time, the employer lacks sufficient funds to make those payments, the employer may have abused its fiduciary duty by mismanaging the monies it owes to employees.[13] If, like the Bank, an employer refuses to make vacation payments to an employee separating from employment, such failure to pay is an abuse Congress intended ERISA to correct.

C. Under This Court's Fort Halifax Decision The Bank's Vacation Benefits Plan Is An Employee Welfare Benefit Plan.

In *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211 (1987), this Court ruled that one-time, state-man-

13. Under the Bank's vacation benefit plan, the employee had a right to contribute to his/her termination benefit. The employee made such contribution by choosing whether to take vacation in the year earned, or to save such vacation time for payment upon termination. If the employee chose to save such time, the employer had a fiduciary duty for the employee's money. This fiduciary duty is clearer than the duty owed under a typical severance plan, where the employee has no opportunity to make such contribution and thus does not entrust any funds to the employer.

dated severance payments upon plant closing were not an "employee welfare benefit plan." Petitioner has tried to analogize the Maine severance statute in *Fort Halifax* to the Massachusetts Statute in this case to argue that the Bank's vacation benefit plan was not an "employee welfare benefit plan." In making such analogy, however, Petitioner has focused solely on the payment of a lump-sum to employees upon termination of employment.[14]

Respondent and the Solicitor General agree with the court below that there is no merit to Petitioner's contention regarding *Fort Halifax*. *Morash* and *Fort Halifax* are distinguishable in two fundamental ways. First, the Maine statute imposed a severance pay obligation in the case of plant closings, but the "employer has no such liability . . . if the employee is covered by a contract that deals with the issue of severance pay," *Id.* at 2214. Since the Maine statute provides that employers must make payments *only* if they have not otherwise agreed to do so, the statute does not apply to employer-sponsored plans. In contrast, the Massachusetts Statute deals with vacation payments "due an employee under an oral or written agreement." Whereas the Maine statute applies only when employers have not agreed to provide benefits, the Massachusetts statute applies only when employers do agree to provide benefits.

Second, this Court considered whether the benefit payments in *Fort Halifax* implicated the administration or enforcement of employee welfare benefit plans, and

14. It is ironic that in this context Petitioner recognizes the analogy between severance pay and the Bank's vacation benefit.

ruled that if a state statute required employers to initiate or maintain a plan, then plan-related concerns might arise. *Id.* at 2216-17. Since the Maine statute, however, required only a one-time payment upon plant closing, it did not implicate either future plans for which administration or enforcement issues might arise or the regulatory concerns of ERISA itself. *Id.*

The Bank's benefit, however, implicated both a plan and ERISA's concerns. As the Massachusetts Supreme Judicial Court noted, the *Fort Halifax* ruling turned on a finding that state law mandated a one-time payment triggered by a *single event, a plant closing,* as opposed to the Bank's program which required adequate funds to meet periodic demands of separating employees. (Pet. A16) When the Bank agreed to reimburse each employee for unused vacation time upon termination from employment, the Bank assumed responsibility to pay benefits and faced periodic demands as each employee left its employ.

Finally, Petitioner assumes that the Bank's program would not raise any issues regarding disclosure and safeguards in the establishment, operation and administration of the program. (Pet. br. 28) Yet the Bank's program did raise such issues. Petitioner simplifies the program by assuming that the Bank "presumably simply computes the number of unused vacation days" and by concluding that "[t]o do little more than write a check hardly constitutes the operation of a benefit plan." (Pet. br. 28) In fact, the record does not address the administration of the Bank's program, other than that it made its payments from general assets. It can be expected, however, that the Bank had to keep track of time earned by each employee, maintain records of time used and/or saved, and make payments

to individual employees upon termination. Thus, the problems of record-keeping, disclosure to employees of the basis for calculations, and abuse, either by failing to ensure sufficient funds to meet employee demands or simply by refusing to make payments, raise the very concerns Congress intended ERISA to cover. *Fort Halifax,* 107 S.Ct. at 2217. Clearly the Bank's plan is an "employee welfare benefit plan," which Congress sought to regulate in ERISA, while the payment in *Fort Halifax* is simply a one-time benefit mandated by the State of Maine in the absence of an "employee welfare benefit plan."

II. THE MASSACHUSETTS LAW "RELATES TO" EMPLOYEE BENEFIT PLANS.

ERISA supersedes state laws only "insofar as they may now or hereafter relate to any employee benefit plan." § 514; 29 U.S.C. § 1144. Petitioner argues that pursuant to such language, even if the Bank's vacation policy were an "employee welfare benefit plan," ERISA does not preempt the Massachusetts Statute because such statute does not "relate to" the plan. Petitioner maintains that the Massachusetts Statute does not relate to a plan because it does not address any of the concerns that ERISA regulates, including disclosure, funding, reporting, vesting and/or enforcement.[15]

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15. Petitioner receives no support from its amici on this argument. The Solicitor General dismisses the argument as entirely unpersuasive. "The acknowledged purpose of [Massachusetts' prosecution of the Bank for failure to pay vacation benefits] is to enforce the bank's vacation leave policy, so the statute plainly 'relate[s] to' the plan." (SG 10) The state Attorneys General and the AFL-CIO do not address the argument.

This Court has explained and recently reiterated that a state law "'relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Mackey v. Lanier Collection Agency and Serv., Inc.,* 108 S.Ct. 2182, 2185 (1988); *Fort Halifax,* 107 S.Ct. at 2215, citing *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 96-97 (1983). The Massachusetts Statute clearly has a connection or reference to a plan. The language of the statute expressly applies to "oral or written agreements to provide vacation pay," which are, in the context of this case, "employee welfare benefit plans." In determining whether to bring a criminal action, the Commonwealth's Department of Labor and Industries must review employer vacation arrangements to determine whether an oral or written agreement exists. If the Department of Labor and Industries determines that an agreement exists, it must then bring a criminal action to enforce such agreement, which is an "employee welfare benefit plan." Thus, Petitioner's argument that the Massachusetts Statute does not relate to or purport to regulate an employee benefit plan is clearly erroneous with respect to enforcement. One of ERISA's basic concerns is that employers pay to their current or former employees the benefits owed them under the terms of a plan. § 502; 29 U.S.C. § 1132 (authorizing civil enforcement actions). The Massachusetts Statute regulates that very same concern because it charges its Department of Labor and Industries with ensuring that employers pay their employees the vacation benefits that have been promised.[16]

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16. The Commonwealth contended below that enforcement is not involved because "[t]he employees here have not filed

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In addition, even if the Department of Labor and Industries took no action other than filing a claim, the Massachusetts Statute causes state interpretation of plans because state courts must determine both whether an employer has made any oral or written agreement respecting vacation pay and the meaning of that agreement. Again, the Massachusetts Statute clearly relates to an "employee welfare benefits plan."[17]

III. MASSACHUSETTS CANNOT EVADE PREEMPTION OF ITS WAGES STATUTE UNDER ERISA'S EXCEPTION FOR "GENERALLY APPLICABLE CRIMINAL LAWS."

A. Introduction.

Petitioner contends that even if the Bank's vacation benefit plan were an "employee welfare benefit plan" under ERISA, the Massachusetts law is not preempted because it is a "generally applicable criminal law." While ERISA's broad preemption provision does contain an exception for

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a claim to . . . compel an employer to pay out benefits from a plan." (Commonwealth's Appellee brief below at 27) Certainly, however, employees who file charges with the Commonwealth expect their employers to be compelled to make payments. In most cases, the courts order that payments be made.

17. Evidently sensing the weakness of its "relates to" argument, Petitioner has argued an additional standard, that a state law must "purport to regulate" ERISA plans. (Pet. br. 52-61) Even if such standard were applicable, Petitioner's argument fails. By the Massachusetts Statute's application to vacation plans and the Commonwealth's enforcement of the Statute to ensure that employers comply with the plans or policies that they allegedly provide to their employees, Massachusetts purports to regulate ERISA-covered plans.

"any generally applicable criminal law of a State," § 514 (b)(4); 29 U.S.C. § 1144(b)(4) (hereinafter the "Exception"), such Exception does not apply here because (1) the Massachusetts law is not a "generally applicable criminal law" as the term is commonly and sensibly understood, and (2) exempting the Massachusetts Statute, and other similar state statutes, would cause exactly the inconsistent and patchwork type of regulation that Congress expressly intended ERISA to eliminate.[18] *Fort Halifax,* 107 S.Ct. at 2217.

B. The Massachusetts Wages Statute Is Not A "Generally Applicable Criminal Law."

Petitioner's argument that the Massachusetts Statute falls under the Exception relies solely on the phrase "generally applicable law." Petitioner contends that such term includes those laws that "extend to the entire state and embrace all persons or things of a particular class." (Pet. br. 66-67) Under Petitioner's theory, the Massachusetts Statute is generally applicable because it applies to all employers who pay wages and/or all employers who provide vacation benefit programs to employees. (Pet. br. 67) That definition is forced, unconvincing and, as the Solicitor General has noted, "plainly flawed." (SG 25) Petitioner's proposal that a statute is generally applicable if it embraces all persons or things of a particular class ignores the opposite, but more logical, conclusion—that a statute which applies only to a certain class of persons, such as all employers who pay vacation pay, is of limited rather than general applicability.

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18. The amici State Attorneys General have joined Petitioner in this argument. The Solicitor General has flatly rejected Petitioner's position. (SG 10-11)

A more logical and common sense definition of the term "generally applicable" was rendered by the Massachusetts Supreme Judicial Court in *Commonwealth v. Federico*, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377-78 (1981), in which the Supreme Judicial Court held

> The § 1144(b)(4) exception from preemption for "generally applicable" State criminal laws appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example. By virtue of § 1144(b)(4), a State is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan, simply because the theft involved such a plan. But by limiting the . . . exception to criminal laws of *general* applicability, Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans.[19]

The Massachusetts Supreme Judicial Court's interpretation is so sensible that, contrary to Petitioner's complaint that there is no uniform standard of the Exception's meaning (Pet. br. 63), the Massachusetts standard has been accepted and applied in other jurisdictions, e.g., *Baker v. Caravan Moving Corp.*, 561 F.Supp. 337, 341 (N.D. Ill.

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19. The Massachusetts Supreme Judicial Court adopted its reasoning in *Federico* in *Morash*. The Massachusetts court stated that "because our statute is limited to the nonpayment of 'wages' by an employer to an employee, including agreed upon vacation payments which will often be funded from 'employee benefit plans,' prosecution under the statute is not saved from preemption by the exception for generally applicable criminal laws." (Pet. A-31-32)

1983); *People v. Art Steel Co.*, 133 Misc.2d 1001, 1009, 509 N.Y.S.2d 715, 720 (1986). As the Solicitor General has noted:

> The majority of courts that have considered the matter have agreed, as the court below noted (Pet. App. A29-30), that the exception "'seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example'" (citation omitted) The Massachusetts statute at issue does not apply to "conduct generally," but instead governs only the wage and benefit payment practices of employers . . . .

(SG 23-24)

Petitioner also claims that its interpretation of "generally applicable" is consistent with a state's right to be free of interference in areas of traditional criminal regulation. Thus, the Commonwealth and its amici states contend that Congress did not intend to preempt states' traditional exercise of police powers, and that wage regulation is such an exercise.

Yet, this case does not invoke the states' traditional right to regulate wages. Instead, this case involves a relatively modern extension of such regulation, the right to regulate vacation benefit plans or programs. Although Massachusetts has regulated wages since 1879, it amended its wages statute to extend to vacation benefits nearly a century later, in 1966. (Pet. br. 19-20)

The amici Attorneys General assert that:

> over half of the statutes in these states explicitly include, or have been interpreted to include vacation wages. (footnote omitted) In many states, *these statutes* have existed in some form for nearly one hundred years. (footnote omitted)

(States 10) (emphasis added). That statement is *materially deceptive.* Whereas the statutes regulating wages may have existed for nearly one hundred years, those that expressly extend to vacation pay were so amended only within the last ten to twenty years.[20] Further, since the states have chosen their wages statutes as their means of regulating vacation pay, it is reasonable to infer that the vacation provisions in such statutes apply only to those vacation payments that are wages, namely those wages that an employee continues to receive while on vacation, not to the payment that an individual receives as a lump-sum distribution upon terminating employment. In summary, the Massachusetts Statute is neither "generally applicable," nor a part of a state's traditional exercise of police powers. The Massachusetts Statute is not saved by the Exception.

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20. For example, North Carolina and Oklahoma amended their statutes to cover vacation pay beginning in 1980 and 1982, respectively. N.C. Gen. Stat. § 95-25.2(16) (Supp. 1988); Okla. Stat. Ann. tit. 40, § 165.1(3) (West 1986). Another seven states, including Illinois, Minnesota and Ohio, enacted legislation in the 1970's to add vacation provisions. Ill. Ann. Stat. ch. 48, para. 39m-2 (Smith-Hurd 1986); Ohio Rev. Code Ann. § 4113.15(D)(2) (Anderson 1980); Minn. Stat. Ann. § 181.74 (West Supp. 1988). Further, a third group of amici states, including Connecticut, New Jersey and Oregon, may apply their wages statutes to vacation pay, but do not have statutory language that expressly refers to vacation payments. Conn. Gen. Stat. Ann. § 31-7 (a) (West 1958 & Supp. 1988); N.J. Stat. Ann. § 34:11-57 (West 1988); Or. Rev. Stat. §§ 652.210(3) & 652.320(9) (1987). The states have not regulated vacation payments as part of their traditional exercise of police powers.

C. Saving This State Law From ERISA's Preemption Clearly Conflicts With The Prrposes Of That Express Preemption.

The states should not succeed in evading preemption of their laws regulating vacation benefits, because excepting such laws would contravene Congress' clear intent to establish a comprehensive regulatory scheme. *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549, 1551 (1987). As Representative Dent noted, the "crowning achievement" of ERISA was "the reservation to Federal authority [of] the sole authority to regulate the field of employee benefit plans." 120 Cong. Rec. 29197 (1974). Similarly, Senator Williams noted that:

> with the *narrow exceptions* specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, *thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.*

120 Cong. Rec. 29933 (emphasis added). Congress' intention that ERISA establish an exclusive system of pension and welfare benefit regulation is undeniable. *Pilot Life,* 107 S.Ct. at 1555. Exempting state regulation of vacation benefit plans from preemption would clash with that intention by creating both a conflict between state regulation and ERISA, and inconsistent regulation from state to state.

The conflict between state requirements and ERISA's provisions permeates their regulatory schemes. This Court has agreed that Congress intended ERISA's civil enforcement provisions to be the "exclusive vehicle of actions by plan participants." *Pilot Life,* 107 S.Ct. at 1555. Yet

whereas ERISA provides for civil penalties in cases of failure or refusal to pay, nearly every amicus state prescribes criminal penalties. (Pet. Appendix B) Moreover, it must be presumed that Congress intended that payment of benefits not be compelled by criminal penalties. This Court has noted that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress enacted a comprehensive scheme including an integrated system of procedures for enforcement." *Pilot Life*, 107 S.Ct. at 1556. In this context, Congress expressly rejected criminal enforcement of plan rights. To allow the states to use criminal statutes to enforce welfare benefit plans would upset the carefully constructed and balanced system of procedures and sanctions created by Congress in ERISA. To permit states to regulate vacation benefits by addressing the same ills as ERISA, but by prescribing different procedures and remedies, is to subject both administrators and participants to a confused and ineffective complex of regulations.

Similarly, differences among state requirements will continue to bemuse administrators. As the Solicitor General has noted, application of state laws to employee benefit plans "would effectively defeat ERISA's goal" of establishing "a uniform administrative scheme to guide claims processing and the disbursement of benefits." (SG 29) An employer with facilities located in more than one state will find itself subject to ERISA and to as many state laws as it has locations. Depending on the state, failure to make vacation payments may be the basis for criminal actions or civil actions, sometimes prosecuted by the state and sometimes prosecuted by employees. Requirements also vary regarding the time of payment. For example,

final payments of vacation pay upon termination of employment can be due immediately upon discharge in California, Cal. Lab. Code § 201 (Deering 1987); on the next business day in Connecticut, Conn. Gen. Stat. Ann. § 31-71c (West Supp. 1988); within 72 hours in New Hampshire, N.H. Rev. Stat. Ann. § 275:44I (1987); within three working days in Alaska, Alaska Stat. § 23.05.140 (1984); and no later than the next regular pay day in Illinois and New Jersey, Ill. Ann. ch. 48, para. 39m-5 (Smith-Hurd 1986); N.J. Stat. Ann. § 34:11-4.3 (West 1988). Penalties differ in terms of fines that range from $50 in Texas, Tex. Lab. Code Ann. § 5157 (Vernon 1987); to $500 in Vermont and Wisconsin, Vt. Stat. Ann. tit. 21, § 345a (1987); Wis. Stat. Ann. § 109.03(2) (West 1988); and to $3,000 in Massachusetts, Mass. Gen. L., ch. 149, § 148 (1982); and depending on whether a state authorizes incarceration, damages, attorneys' fees and interest.

This Court has advised that whether ERISA preempts state law is a question of Congressional intent, and that the purpose of Congress is the "ultimate touchstone." *Pilot Life*, 107 S.Ct. at 1552. It is clear that Congress intended ERISA's preemption to be expansive. It is also clear that the purpose of that expansiveness was to ensure regulation of employee welfare benefit plans by a uniform system. Permitting the states to evade preemption, by means of the "generally applicable criminal laws" exception, or otherwise, would both disregard and disobey Congress' clear intent.

CONCLUSION

The judgment of the Massachusetts Supreme Judicial Court should be affirmed.

Respectfully submitted,

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